IN THE SUPREME COURT OF MISSOURI

SC 92564

VICTOR ALLRED,

Respondent/Cross-Appellant,

v.

ROBIN CARNAHAN,

Respondent,

and

THOMAS SCHWEICH,

Appellant/Cross-Respondent,

and

MISSOURI JOBS WITH JUSTICE

Respondent/Cross-Appellant

On Appeal from the Circuit Court of Cole County
Honorable Jon E. Beetem

RESPONSE BRIEF BY INTERVENOR/RESPONDENT/ CROSS-APPELLANT MISSOURI JOBS WITH JUSTICE

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STATEMENT OF FACTS

The Statement of Facts set forth in Victor Allred's Opening Brief is incomplete in several respects and it contains argument in violation of Rule 84.04(c). Missouri Jobs with Justice offers the following Statement of Facts, which supplements but does not repeat the facts provided by Mr. Allred. Mo. Sup. Ct. R. 84.04(c).

A. Experience and Training of Auditor's Representative

Jon Halwes, a 27 year employee of the Auditor's Office, prepared the fiscal notes and fiscal note summaries in this case. (Tr. at 29-30, 77.) Mr. Halwes is a certified public accountant and a certified governmental financial manager, which means that he has achieved proficiencies in the areas of budgeting, accounting, auditing and forecasting. (Tr. at 77-78.) Mr. Halwes has prepared 60 or 70 fiscal notes and summaries since he started doing this type of work in November, 2010. (Tr. at 79.) He received some training from attorney Joe Martin, the Chief of Staff for the last Auditor, who had handled fiscal notes and summaries for four or five years. (Tr. at 77.)

B. Submissions from State and Local Entities

After receiving the initiative petitions from the Secretary of State on October 5, 2011, Mr. Halwes contacted a cross-section of fifty different governmental entities, including state governmental agencies, local entities, and political subdivisions, and requested their input on the estimated cost or savings from the measures. (Tr. at 80-81; L.F. at 44, 58; Jt. Ex. 3, see Intrv's App. at A-058; Jt. Ex. 4, see Intvr's App. at A-072.) Although Mr. Halwes did not select the entities, he knew that they were diverse in size, location, and type of governmental structure. (Tr. at 80-81.)

Twenty-eight of the fifty entities responded. (L.F. at 45-48, 59-62; Jt. Ex. 3, see Intrv's App. at A-059 - A-062; Jt. Ex. 4, see Intrv's App. at A073-076.). The Auditor's Office cannot compel submissions from entities that do not respond. (Tr. at 81.) Mr. Halwes reviewed the 28 submissions he received for completeness and reasonableness, making sure that each entity's response conveyed a complete representation of what the entity intended to send and was reasonably related to the proposed amendments. (Tr. at 48, 82-84, 92.) If Mr. Halwes found a response to be unreasonable, that affected the weight given to that response in preparing the fiscal note summary. (Tr. at 33.) Mr. Halwes generally does not follow up with entities that do not respond, unless they deferred their response to another entity which then fails to respond, or the initiative concerns a peculiarly local issue. (Tr. at 33-34, 90, 125-126.)

Most of the state agencies deferred to the Office of Administration ("OA") to respond on their behalf. OA estimated that the initiative petitions would result in approximately $540,000 of new wage costs to state agencies, not counting some seasonal employees. (Jt. Ex. 3, see Intvr's App. at A-060 – A-062; Jt. Ex. 4, see Intvr's App. at A-074 – A-075.) Mr. Halwes believed that OA's submission provided a pretty clear picture of the costs to the State of an increase in the minimum wage. (Tr. at 113-14.) He had no reason to think that the submission was inadequate or incomplete. (Tr. at 85.)

Only seven local entities responded to Mr. Halwes' request. One of them reported that the initiatives were expected to have no direct cost; one reported an unknown fiscal impact; and five reported cost increases that together totaled $772,182. (Jt. Ex. 3, see Intvr's App. at A-061 – A-062; Jt. Ex. 4, see Intvr's App. at A-075 – A-076.) Mr. Halwes

"knew from the local governments that didn't respond" to his request for comments that the actual cost of an increase in the minimum wage to local governments would be higher than this amount. (Tr. at 91-92.) However, he did not attempt to extrapolate a higher number because he did not have accurate information about the number of minimum wage workers employed by each local entity. (Tr. at 68.)

None of the state or local respondents quantified any effect that the initiatives would have on revenues. (Jt. Ex. 3, see Intvr's App. at A-059 – A-062; Jt. Ex. 4, see Intvr's App. at A-073 – A-076; Tr. at 117, 120-21.) OA did, however, mention five areas in which an increase in the minimum wage could have an indirect effect on revenues by an unknown amount: increased wages for some employees, increased consumption for those employees, lower overall employment, lower business investment, and increased prices. (Jt. Ex. 3, see Intvr's App. at A-060; Jt. Ex. 4, see Intvr's App. at A-074.) The City of St. Louis reported that the initiatives could result in increased earnings and payroll taxes that could be offset by a reduction in workforce at affected establishments. (Jt. Ex. 3, see Intvr's App. at A-062; Jt. Ex. 4, See Intvr's App. at A-074.)

C. Submission by Missouri Jobs with Justice to the Auditor

By arrangements made by its attorney, Intervenor Missouri Jobs with Justice, a proponent of the minimum wage initiative petitions, submitted a proposed statement of fiscal impact to the Auditor's Office on October 20, 2011 – which was after the ten day deadline in §116.175, R.S.Mo., for submissions by proponents or opponents, but before the Auditor's October 25 deadline for completion of the fiscal notes and summaries. (Tr. at 36-37.) Mr. Halwes explained his reason for including information from this submission in

the fiscal note even though it was after the ten day deadline: "Well, in my mind the more information that we can obtain the better fiscal note and fiscal note summary we can have, and if we get it within the time frame to allow us to analyze it, then I'm going to include it." (Tr. at 82.)

Missouri Jobs with Justice patterned its proposed statement on the fiscal note for the 2006 initiative petition that increased the state minimum wage at that time, and attached a copy of the 2006 fiscal note that the Auditor prepared to its proposed statement.[1] (Tr. at 40, 97-98; Jt. Ex. 7, see Intvr's App. at A-088 – A-110.) It did not attempt to quantify direct costs to state and local governments from the initiatives, leaving blanks in the proposed statement for the Auditor to fill in based upon the responses he received. (Jt. Ex. 7, see Intvr's App. at A-088, A-096, A-108.) It calculated revenue projections using data from the Bureau of Labor Statistics and the Congressional Budget Office, and in a manner similar to the 2006 fiscal note. (Jt. Ex. 7, see Intvr's App. at A-088 – A-110.) It set forth its calculations and source data on a spreadsheet and chart and cited sources. (*Id.*) Mr. Halwes verified the sources on the spreadsheet, recreated some of the calculations, and

[1] In 2006, proponents submitted a similar initiative petition increasing the state minimum wage to $6.50 per hour. The State Auditor drafted a fiscal note and fiscal note summary as here. After qualifying for the ballot, voters approved the measure in every county in the state and by a total margin of 76%. See Missouri Secretary of State, Official Election Returns, State of Missouri General Election November 2006, available at http://www.sos.mo.gov/enrweb/ballotissueresults.asp?arc=1&eid=189.

evaluated the reasonableness of the assumptions used by Missouri Jobs with Justice. (Tr. at 45-48.) He did not find the assumptions to be unreasonable. (Tr. at 48.)

Missouri Jobs with Justice estimated that a dollar increase in the minimum wage would generate $360 million in increased wages statewide, which in turn would yield $10.6 million in increased income taxes and $3.8 million in increased sales tax revenues. The combined total of these revenue increases was $14.4 million. (Jt. Ex. 7, see Intvr's App. at A-095, A-107.) Missouri Jobs with Justice also noted, as OA did in its response in the 2006 fiscal note, that an increase in the minimum wage could result in the potential for lower employment, decreased business investment, or increased inflation. However, it did not quantify those possible effects. (*Id.*)

D. Failure of Plaintiff to Submit Proposed Fiscal Impact Statement

Plaintiff Allred became aware of the minimum wage initiative petitions no later than October 6, 2011. (Tr. at 183-84.) This was one day after the Secretary of State sent the petitions to the Auditor for preparation of fiscal notes and nineteen days before the Auditor's fiscal notes and summaries had to be completed. (Tr. at 36.) Plaintiff's expert witness at trial, Dr. David Macpherson, testified that he could have prepared a proposed statement of fiscal impact for submission within 20 days. (Tr. at 169.) Mr. Halwes would have considered proposed statements from Plaintiff or any other opponent of the initiative petitions if they had been submitted before October 25. (Tr. at 106.) However, no opponent submitted such a statement of fiscal impact. (*Id.)*

E. Fiscal Note

The Auditor's normal process is to include in the fiscal note the information

provided by state and local governmental entities and proponents and opponents of the proposed measure. (Jt. Stip., ¶23, see Intvr's App. at A-039.) Responses are often incorporated verbatim, and the Auditor's Office makes as few changes to them as possible. (Jt. Stip., ¶22, see Intvr's App. at A-038 – A-039.) Mr. Halwes followed the standard process in preparing the fiscal notes for the minimum wage initiative petitions. (Tr. at 31-32.) Generally it takes 5-10 hours for Mr. Halwes to prepare a fiscal note summarizing and incorporating submissions. (Tr. at 122.) He was unable to remember specifically how long it took for him to prepare the fiscal notes and summaries for the minimum wage initiative petitions. Often it is necessary for him to work on several fiscal notes at the same time. (*Id.*) It would have taken "many hours" for Mr. Halwes to independently review all of the assumptions behind all of the submissions. (*Id.*).

F. Fiscal Note Summary

After completing the fiscal notes for the minimum wage petitions, Mr. Halwes prepared fiscal note summaries. The Auditor's Office relies heavily on the submissions of interested parties to construct a summary, and this case was no exception. (Tr. at 91, 94.) Mr. Halwes tries to include information in the summary that is "relevant to the voters" – meaning that it is "on point with what the fiscal note or what the initiative petition is related to and it is as complete as possible." (Tr. at 34-35.)

Based on the cost estimates submitted by OA and five local governments (totaling about $1.3 million), the Auditor's Office concluded that, "Increased state and local government wage and benefit costs resulting from this proposal will exceed $1 million annually." (Jt. Exs. 5 and 6, see Intvr's App. at A-085 – A-086.) At the time the

summaries were prepared, the Auditor's Office had no evidence suggesting that the actual cost to state and local governments of an increase in the minimum wage was many times $1 million. (Tr. at 118.)

Based on the submission by Missouri Jobs with Justice, which was patterned on the Auditor's 2006 fiscal note, and using the responses from OA and the City of St. Louis, the Auditor's Office also wrote,

> State government income and sales tax revenue could increase by an estimated $14.4 million annually; however, business employment decisions will impact any potential change in revenue. Local government revenue will change by an unknown amount.

(Jt. Exs. 5 and 6, see Intvr's App. at A-086 – A-086.) The "however" clause was intended to reflect the possibility that increased revenues could be offset by job losses or decreased business investment. (Tr. at 57-58, 60, 119-20.)

G. Plaintiff's Expert, Dr. David Macpherson

Plaintiff's expert, Dr. David Macpherson, has been a Ph.D. labor economist for over 25 years. (Tr. at 162-63.) He is opposed to the minimum wage because he believes that it does not help the people it is supposed to help. (Tr. at 162-63.)

Dr. Macpherson spent 12 to 15 hours reviewing the fiscal notes and fiscal note summaries in this case, and doing his own calculations based on assumptions independent of the responses the Auditor received from state and local governmental entities. (Tr. at 141, 163-65.) In Dr. Macpherson's opinion, the Auditor "should do a totally different approach than what he did," even though the statute does not require it, because "it would

be a lot more accurate." (Tr. at 174-75.)

Dr. Macpherson used data from a small number of individual responses in the Current Population Survey of the Bureau of Labor Statistics to estimate how many state and local government employees in Missouri earn the minimum wage, and concluded that the direct cost to government employers would be about $16 million. He also calculated a confidence interval. (Tr. at 138-39, 148-51.) Dr. Macpherson concluded, based on research studies finding that an increase in the minimum wage causes job losses, that the initiatives would cost the state $4 million in unemployment benefits, and would result in a $9.2 million loss of corporate tax revenues. (Pltf. Ex. 11, at 11-12, deposited with the Court.) Dr. Macpherson admitted that peer-reviewed labor economists such as Sylvia Allegretto and Michael Reich at University of California – Berkeley, who have published in the same journal that he has published in, and Alan Krueger at Princeton University dispute the theory that an increase in the minimum wage causes job losses. (Tr. at 167, 178-79.)

H. Intervenor's Expert, Dr. Michael Kelsay

Intervenor Missouri Jobs with Justice presented expert testimony by Dr. Michael Kelsay in support of the Auditor's note. Dr. Kelsay is a research professor in the Center For Full Employment and Price Stability, in the Department of Economics at University of Missouri at Kansas City. (Tr. at 184-86.) Dr. Kelsay has done research on the effect of increases in the prevailing wage on employment levels and state and local tax revenues, using data such as the Current Population Survey. (Tr. at 190-95.) He also stays abreast of the current empirical literature on the minimum wage. (Tr. at 196.) He is a supporter of the

minimum wage. (Tr. at 208.) He acknowledged an ongoing debate in the academic community as to whether an increase in the minimum wage results in job losses. (Tr. at 233-236.) Older studies showed a "negative elasticity" between a higher minimum wage and employment levels, but more recent studies by Allegretto and Reich find no significant job loss. (*Id*.)

Dr. Kelsay performed some independent calculations regarding the likely effect of an increase in the minimum wage on state and local revenues. He built in an assumption that an increase for minimum wage workers has a "ripple effect" resulting in smaller raises for workers just above the minimum wage. (Tr. at 212-22.) He concluded that a dollar increase in the minimum wage is likely to result in $360 million in increased wages for Missouri workers. (Tr. at 222.) Those increased wages, Dr. Kelsay testified, are likely to translate into an increase in income taxes between $8.3 and $9.2 million, and an increase in state and local sales taxes around $6.054 million. (Tr. at 227, 230-31; Intvr. Ex. C-1, see Intvr's Supp. App. at A-130-131.)[2] Dr. Kelsay disputed Dr. Macpherson's conclusions about a loss of corporate tax revenues, because 82 percent of corporations in Missouri (especially smaller corporations that are affected more by an increase in the minimum wage) do not pay corporate income tax. (Tr. at 237.)

In response to questioning by counsel for the Auditor, Dr. Kelsay testified that the contents of the fiscal note submissions and assumptions, which the Auditor put into the

[2] Intervenor has started the page numbers of its Supplemental Appendix where the page numbers of its original Appendix left off.

note, were conservative and reasonable. (Tr. 246-247.)

I. Status of Versions 1 and 2 of the Initiative Petition

On April 10, 2012, Mr. Chris Grant, counsel for Missouri Jobs with Justice, sent a letter to the Secretary of State, requesting to withdraw Version 2 of the Minimum Wage Initiative Petition. (Jt. Ex. 8, see Intvr's App. at A-111.) On April 16, 2012, the Secretary of State's Office notified Mr. Grant that it had accepted his request to withdraw Version 2. (Jt. Ex. 9, see Intvr's App. at A-120.)

Following the trial on May 1, 2012, Missouri Jobs submitted to the Secretary of State signatures in support of Version 1 of the initiative. These petitions are currently being reviewed by the Secretary of State's Office, and are then sent to local election authorities so signatures can be verified against voter registration records. See Missouri Secretary of State, News Releases, available at http://www.sos.mo.gov/news.asp?id=1094.

J. Circuit Court's Rulings

On April 18, 2012, the Circuit Court issued its decision upholding the fairness and sufficiency of the summary statement for Version 1 of the petition. (L.F. at 173-180.) The Court withheld a ruling on the summary statement for Version 2 of the petition, because it had been withdrawn. (L.F. at 173, 180.)

On May 18, 2012, the Circuit Court issued its Final Judgment upholding the fairness and sufficiency of the fiscal notes and fiscal note summaries for both initiative petitions.

(L.F. at 347-48.)[3] The Court refused to take sides in the battle of the experts:

> Not only is Plaintiff's assertion of a duty by the Auditor to pursue independent analysis unsupported and contrary to existing case law, but it leads to the very danger cited in the *Missourians Against Human Cloning v. Carnahan* and *Missourians to Protect the Initiative Process v. Blunt* cases. That danger being of turning the process into a partisan wrangle in the courtroom instead of leaving it to a public campaign to persuade the voters. The record in this case reveals that danger fully – on one side a labor economist who has spent his quarter century career strongly opposing any minimum wage increase versus an economist who supports it. The Plaintiff would have the Auditor, and the Court, take sides on issues such as whether a minimum wage increase does in fact cause certain effects. That debate is for a public election campaign on the merits of the Initiative Petitions, not for the provision of a fiscal note or fiscal note summary.

(L.F. at 336-37.) The Court found that it was sufficient that the Auditor's Office solicited information from state and local government entities, reviewed their submissions and that of a proponent for reasonableness and completeness, and incorporated the submissions into

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[3] The Court also issued its Final Judgment upholding the fairness and sufficiency of the summary statements for both versions of the petition. (L.F. at 347-48.) It is not clear why the Circuit Court issued a judgment on the merits of the ballot title for Version 2, since it is moot.

the note. (L.F. at 326, 334-36.) The Auditor need not be a labor economist or consult with one, nor does he need to conduct his own independent research. The Court held that "the timeline granted to the Auditor to create a fiscal note and fiscal note summary effectively prevents it." (L.F. at 336.)

While upholding the fairness and sufficiency of the fiscal note and fiscal note summary, the Court gave Plaintiff judgment on Count IV of the First Amended Petition. The Court held that §116.175, R.S.Mo., which requires the Auditor to prepare fiscal notes and summaries, is unconstitutional because it exceeds the Auditor's powers granted by Article IV, §13 of the Missouri Constitution. (L.F. at 343-48.)[4]

[4] This ruling is the subject of Intervenor's Cross-Appeal, and is addressed in Intervenor's Opening Brief.

SUMMARY OF THE ARGUMENT

The Secretary of State's summary statement for Version 1 presents a fair and accurate explanation of the purpose and probable effects of the initiative petition. Version 1 at its root seeks to increase the minimum wage, both for hourly and tipped employees. That is what the summary statement explains.

Plaintiff's arguments regarding the summary statement amount to parsing and quibbling over certain words. With regard to the state rate becoming the federal rate if higher, and the proposed measure then indexing that rate based on changes in the Consumer Price Index, any reference to existing law is in fact new law as it applies to indexing the minimum wage rate and is necessary to explain the probable effects of the proposed changes. Unlike now, under Version 1 the state rate will become the federal rate if higher and then be indexed. After reading the summary statement, a minimum wage employee will know this – she will know that she is getting a raise to $8.25 per hour and she will know that, if the federal rate is ever higher, then that rate will increase and decrease with the CPI. This is a fair summary.

With regard to tipped employees, the reference to the minimum wage for tipped employees is a common sense way to explain how they will be affected. Currently employers must pay tipped employees a minimum of 50% of the minimum wage (e.g., $3.63 per hour). Because tipped employees may make more than the current minimum wage ($7.25 per hour) with tips, the 50% minimum rate tipped employees receive in wages is their functional minimum wage. Plaintiff takes an overly technical view that is not required to explain this proposed measure. It is adequate to refer to the 50% rate as the

minimum wage for employees who work for tips, and not misleading to say that the proposed measure will increase their minimum wage to 60% of the state minimum wage.

The Auditor's fiscal note and fiscal note summary are also fair and sufficient. Plaintiff faults the Auditor for focusing too much on process. But, that is what Plaintiff does. The fiscal note here presents a picture of the fiscal consequences of the measure on numerous state and local entities. The note is based on information that the Auditor had at the time. The law does not require the fiscal note to be a perfect economic analysis and to detail every cost. This is not a case where the Auditor entirely failed to account for critical information. In fact, the Auditor recognized the possibility of additional personnel costs to governmental entities and of decreases in revenues from job loss, and he referenced these consequences in the fiscal note summary by using more general language. This is not deceptive, but helpful to voters.

Plaintiff's claim that the Auditor must undertake an independent investigation is not supported by the controlling statute. The General Assembly gives the Auditor discretion to contact entities and for proponents and opponents to submit information. The Auditor does not have the time to undertake an independent investigation, nor can he be held to the standard of a PhD economist. The Auditor should not have to compel and second-guess reasonable submissions from entities, but should be able to rely on responses and non-responses. Nor should the Auditor wade into the policy debates surrounding initiative petitions, which an independent investigation would entail. In this case, proponents and opponents argue vigorously whether an increase in the minimum wage causes job loss. It is not the Auditor's role to pick a winner among these opposing viewpoints by

independently researching the issue himself, double-checking economic theories and assumptions, and adopting one side's view over another's in the resulting fiscal note.

Plaintiff had the opportunity to submit information on the measures but failed to. He knew of the initiative petitions, but did not submit information to the Auditor. Plaintiff should not be able to rely on information that he could have submitted in a later fiscal note challenge. Plaintiff's strategy incentivizes the withholding of information and the filing of lawsuits, rather than the provision of information to the Auditor and by extension to voters. Why would an opponent provide a proposed statement of fiscal impact, if he can withhold information, get an expensive expert, and be in a better legal position to sue in an attempt to stop the initiative petition that he is campaigning against? Such a strategy is against Section 116.175, which gives opponents the opportunity to submit statements, and is bad policy. The answer is for the Court not to permit an opponent to prove that a fiscal note or fiscal note summary is unfair or insufficient based on evidence that he did not submit within the applicable time period.

ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED JUDGMENT FOR THE SECRETARY OF STATE ON COUNT I OF PLAINTIFF'S PETITION, BECAUSE THE SUMMARY STATEMENT IS FAIR AND SUFFICIENT, IN THAT IT ACCURATELY INFORMS THE VOTER OF A CHANGE IN THE LAW WITH REGARD TO THE COST OF LIVING ADJUSTMENT, AND ADEQUATELY EXPLAINS HOW THE NEW LAW APPLIES TO TIPPED EMPLOYEES. (Responding to Cross-Appellant Allred's Point I.)

A. Standard of Review

The trial court decided the fairness and sufficiency of the summary statements on the parties' cross-motions for judgment on the pleadings. This Court reviews the trial court's legal conclusions and application of the law to the facts *de novo.* *Missouri Municipal League v. Carnahan*, 2011 Mo. App. LEXIS 1142, at *5-6 (Mo. App. W.D. September 6, 2011); *Shivers v. Carr*, 219 S.W.3d 301, 303 (Mo. App. S.D. 2007) ("[I]n cases where the facts are not in dispute, appellate review is de novo.").

B. The Burden of Proof is on Plaintiff and the Court's Role is Limited.

It is Plaintiff's burden to show that the summary statements in this case are "insufficient or unfair" and could and should have been different. §116.190.3, R.S.Mo.; *see Overfelt v. McCaskill*, 81 S.W.3d 732, 737 (Mo. App. W.D. 2002) (plaintiff required to provide trial court with sufficient evidence on what the fiscal note or ballot title should have stated). "Insufficient" means "inadequate; especially lacking adequate power, capacity, or competence." *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d

451, 456 (Mo. App. W.D. 2006) (citing *Hancock v. Secretary of State*, 885 S.W.2d 42, 49 (Mo. App. W.D. 1994)). The word "unfair" means to be "marked by injustice, partiality, or deception." *Id.*

The Court's role in initiative petition cases is limited. Where an opponent of a measure (such as Plaintiff) brings suit, the Court should give great deference to the State's efforts:

> Our role is not to act as a political arbiter between opposing viewpoints in the initiative process: When courts are called upon to intervene in the initiative process, they must act with restraint, trepidation, and a healthy suspicion of the partisan who would use the judiciary to prevent the initiative process from taking its course.

Missourians Against Human Cloning, 190 S.W.3d at 456 (citing *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. 1990)).

C. The Standard for Assessing a Summary Statement

The Court will find a summary statement to be sufficient and fair as long as it "makes the subject evident with sufficient clearness to give notice of the purpose to those interested or affected by the proposal." *Overfelt*, 81 S.W.3d at 738. The important test, and the only test, "is whether the language fairly and impartially summarizes the purpose of the measure, so that the voters will not be deceived or misled." *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. W.D. 1999).

A summary does not need to set out all of the details of the proposal. *United Gamefowl Breeders Ass'n of Mo v. Nixon*, 19 S.W.3d 137, 141 (Mo. banc 2000). Nor does

it need to be as specific as an opponent may propose, even if a greater level of specificity may be preferable. *Bergman*, 988 S.W.2d at 92. The standard is not whether the summary statement is the best language. *Id.* Nor is the standard how the Court would write the statement if it had produced the language in the first place. Rather, the standard is simply whether the statement is an "appropriate and adequate way" of writing the language. *See Asher v. Carnahan*, 268 S.W.3d 427, 431 (Mo. App. W.D. 2008) ("there are many appropriate and adequate ways of writing the summary ballot language.").

Missouri courts regularly reject challenges to summary statements. Intervenor is aware of only two published appellate cases where a Missouri court has found a summary statement to be insufficient and unfair. The first is *Cures Without Cloning v. Pund*, 259 S.W.23d 76 (Mo. App. W.D. 2008), which was a challenge brought by the proponents to the summary statement for their own measure. The Secretary of State's summary stated that the measure would "repeal the ban on cloning." In fact, the proposed amendment would *expand* the ban on cloning -- that is, it would do the *exact opposite* of what the summary statement said it would do. On this point, and this point only, the Secretary of State was ordered to re-write the language, to say "change" rather than "repeal."

The second case is *Missouri Municipal League v. Carnahan (MML I)*, 303 S.W.3d 573 (Mo. App. W.D. 2010). The summary statement there restated, in part, existing law on requiring just compensation for takings. The Court of Appeals found this language to be insufficient and unfair because it suggested a change was being made to "just compensation" that was not, in fact, being amended. But, Plaintiff's claims to the contrary, this does not mean that a summary statement cannot reference existing law. The

Western District in *Missouri Municipal League v. Carnahan (MML II)*, 2011 Mo. App. LEXIS 1142, at *10 (Mo. App. W.D. 2011), held that the "mere fact that a proposal references" current law "does not make it automatically unfair or prejudicial." Indeed, the Court found that "such a rule would be absurd in that at least in some instances context demands a reference to what is currently present to understand the effect of the proposed change." *Id*; *see also Coburn v. Mayer*, 2012 Mo. App. LEXIS 815 (Mo. App. W.D. June 13, 2012) (reference to presently existing law is not misleading where summary statement indicates that proposed amendment elaborates on meaning of current law).

D. The Summary Statement for Version 1 of the Initiative Petition is Sufficient and Fair.

The summary statement clearly promotes a fair and informed view of the purpose and probable effects of Version 1 of the Initiative Petition.[5] The initiative would amend §290.502.1, R.S.Mo., to increase the minimum wage to $8.25 per hour, or the federal rate if that is higher. (Jt. Ex. 1 at 000076, see Intvr's App. at A-049.) It would continue the existing cost of living adjustment ("COLA") to the state minimum wage, and extend the COLA to the federal wage if it is higher and thereby adopted as the state minimum wage. (*Id.*) It would amend §290.512.1, R.S.Mo., to increase the wages paid to tipped employees

[5] As discussed below, Plaintiff's challenge to the ballot title for Version 2 of the Initiative Petition is moot, because Intervenor withdrew Version 2 on April 10, and no signatures were submitted in support of Version 2 before the May 6, 2012 deadline. (Jt. Ex. 8, see Intvr's App. at A-111.)

to 60% of the state minimum wage. (*Id.*) It would also increase liquidated damages, lengthen the statute of limitations, and modify the small business exemption. (Jt. Ex. 1 at 000075, 77, see Intvr's App. at A-048, A-050.)

The summary statement accurately reflects these proposed changes in the law. The first bullet point accurately describes how Version 1 will work. The reference to existing law -- adjustments based on the CPI – is to describe a change and is necessary to explain the probable effects of the proposed change. (Jt. Ex. 5, see Intvr's App. at A-085.) Version 1 elaborates on existing law. It extends adjustments based on changes in the CPI from the state rate to the federal rate if higher. After reading the first bullet point, voters currently making $7.50 per hour, for instance, will have a clear understanding of how the measure will affect them if it passes. They will get a raise to $8.25 per hour. In addition, if the federal rate is ever higher, they will get a boost to the federal rate, which will then rise and fall based on changes in the CPI.

The second bullet point of the summary statement states: "Increase the minimum wage for employees who receive tips to 60% of the state minimum wage." (*Id.*) This is a shorthand way of saying that tipped employees will receive a larger base salary from their employers before tips are added in.

The third bullet point states: "Modify certain other provisions of the minimum wage law including the retail or service business exemption and penalties for paying employees less than the minimum wage." (*Id.*) This bullet point corresponds to the proposed changes in §§ 290.500(m) and 290.527, R.S.Mo. The fact that this bullet point does not include

details as to every change, or provide greater specificity, does not mislead voters. *United Gamefowl Breeders*, 19 S.W.3d at 141.

The summary statement as written promotes an informed view of the purpose of the proposed amendment – to increase the minimum wage. A voter reading the statement will surely understand that a "yes" vote for the proposed amendment will increase the minimum wage. The summary statement also explains the probable effects – that the minimum wage will increase if the federal rate is higher and then rise and fall with the CPI; that the minimum wage will increase for tipped employees; and that the business exemption and liquidated damages provision will change. While Plaintiff or the Court may have written the statements differently, the test is whether the language is adequate and informs voters so they will not be deceived or misled. *Bergman*, 988 S.W.2d at 92. The summary statement does not deceive or mislead as to purpose or effects.

E. The Summary Statement accurately describes a change in the operation of the COLA provision, and does not restate existing law.

Plaintiff argues in Section (C)(1) of his first Point that the summary statement is fatally flawed because it falsely suggests that the initiative would "amend" a COLA provision that is already contained in current law. (Plaintiff's Opening Brief, at 25-29.) In Section (C)(3) of his first Point, Plaintiff argues that the summary statement is deficient because it *fails* to notify the voter of a "sea change" in the operation of the existing COLA provision – namely, that the state wage will *become* the federal wage if it is higher, and will become subject to an annual COLA adjustment. Plaintiff refers to this change as the "super-escalator" provision.

The trial court correctly found that the reference in the first bullet point of the summary statement to the "annual wage adjustment" highlights the so-called "super-escalator" provision in Version 1, and does not merely restate the existing COLA provision. (L.F. at 177-78.) The reference to the CPI in the summary statement, which is in the current, is to explain a change. This is perfectly fair. It would be absurd not to reference the CPI, when the proposed measure amends the law to make a higher federal rate subject to changes in the CPI.

Plaintiff's response on page 37 of his Opening Brief is to point out that Version 2 of the initiative does not contain a super-escalator provision. The Secretary of State cannot have it both ways, Plaintiff argues: either the COLA language refers to the new super-escalator (and therefore fails to accurately describe Version 2), or it impermissibly restates the COLA provision in existing law in violation of *MML I* (and therefore both Versions are defective).

Version 2 of the initiative petition is no longer before the Court. Intervenor withdrew it from consideration, and the Secretary of State acknowledged the withdrawal. (Jt. Ex. 8, see Intvr's App. at A-111; Jt. Ex. 9, see Intvr's App. at A-120.) Because the summary statement for Version 2 "will not be on the November [2012] ballot under any circumstances, there is no live controversy for this court to resolve." *Asher v. Carnahan*, 268 S.W.2d at 429. "'A cause of action is moot when the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered, would not have any practical effect upon any then existing controversy.'" *Asher*, 268 S.W.3d at 430 (quoting *River Fleets, Inc. v. Creech*, 36 S.W.3d 809, 813 (Mo. App. W.D. 2001) (citation

omitted)). "Missouri courts do not determine moot causes of action." *River Fleets*, 36 S.W.3d at 813. Under these circumstances, whether or not the summary statement was fair and sufficient as to Version 2 can have no bearing on whether it is fair and sufficient as to Version 1.[6]

It is incumbent on the Secretary of State to promote an informed understanding of the probable effect of a proposed amendment. *See Cures Without Cloning v. Pund*, 259 S.W.3d 76, 82 (Mo. App. 2008). The Secretary of State does not need to parse and separately identify every difference between current law and new law to explain in a

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[6] Even if Intervenor had submitted signatures on Version 2, and Plaintiff's claims were live with respect to Version 2, the Court could have accepted alternative constructions of the COLA language in the summary statement. That language could be viewed as *both* an important contextual reference to existing law as well as a reference to the new super-escalator.

Assuming for the sake of argument that the summary statement was insufficient as to Version 2, that does not render it insufficient as to Version 1. What matters is not the Secretary's subjective intent, but the voter's objective understanding of the summary statement as applied to the Version of the initiative that is on the ballot. *Cf. Johnson v. State*, 2012 Mo. LEXIS 99, at *47 (Mo. May 25, 2012) (constitutionality of reapportioned Congressional districts "is determined objectively, requiring no proof of the subjective intent of the reapportionment commission.")

common sense manner the effect of a change. Rather, she can draft a bullet point that when read as a whole explains to interested persons how they will be affected. The summary statement here fairly and impartially informs voters how much minimum wage workers will make after the measure passes.[7]

F. The Summary Statement accurately explains how the new law applies to tipped employees.

Plaintiff next argues that the summary statement misleads voters regarding the application of the minimum wage to tipped employees. Currently, Missouri's Minimum Wage Law states that no employer of an employee who receives tips is required to pay "in excess of fifty percent of the minimum wage specified in sections 290.500 to 290.530." §290.512.1, R.S.Mo. At the current rate of $7.25 per hour, an employer pays a tipped employee $3.63 hour plus tips. The proposed amendment would change this percentage to "sixty percent of the minimum wage specified in sections 290.500 to 290.530". The summary statement mirrors this language. It states that the proposal will increase the minimum wage for employees who receive tips "to 60% of the state minimum wage." (Jt. Ex. 5, see Intvr's App. at A-085.) This is a fair summary. The law uses a percentage and

[7] Plaintiff contends in his Complaint that the summary statement should say: "Increase the state minimum wage to $8.25 per hour, or to the federal minimum wage if that is higher." (L.F. at 16.) Plaintiff's formulation is more confusing than the Secretary of State's. It gives no indication to voters that, if the federal rate is higher, it will become the state minimum wage, and will then be adjusted based on changes in the CPI.

the term "minimum wage specified in sections 290.500 to 290.530," and the summary uses a percentage and the term "state minimum wage," which is the minimum wage specified in §§290.500 to 290.530. It cannot be misleading for the Secretary of State to use language in the summary statements that is similar to that in the proposed amendment.

Plaintiff stresses the fact that current law permits employers of tipped employees to directly pay as little as 50% of the minimum wage, only so long as the employee's total compensation (tips plus wages) equals at least the minimum wage. Plaintiff therefore argues that the minimum wage applicable to tipped workers is, technically, the full minimum wage and that the summary statement misleadingly suggests that such employees are subject to a lower minimum wage – whether it be the current 50% figure, or the proposed 60% figure.

Plaintiff appears to argue that all of the details of this complex system must be squeezed into the one hundred word ballot title in order not to mislead voters. That is not what the law requires. *United Gamefowl Breeders*, 19 S.W.3d at 141. It is of course true that, technically, under the Missouri minimum wage – as under the federal minimum wage -- when tipped workers do not receive enough tips to bring them up to the full minimum wage (currently $7.25), their employer must make up the difference. But, under the proposed measure, all tipped workers making the current minimum -- $3.63 per hour – will receive a raise, whether they make $3.62 per hour in tips or $11.00 per hour or more in tips. Tips put many employees' total compensation over the current minimum wage of $7.25 per hour. Tips also vary from day to day. An employee may make $4.00 per hour in tips one day and $11.00 per hour in tips the next. Because tips often put employee wages over

the current minimum wage, the 50% wage required to be paid by the employer (60% under the proposal) is the functional equivalent of their minimum wage.

The summary statement is also proper in characterizing the change for tipped employees as an "increase." A voter is not going to read the phrase "increase . . . to 60%" and think that employees who work for tips are now going to earn less or receive a separate, lower state minimum wage than all other minimum wage employees. An "increase" undoubtedly communicates that workers will receive greater wages, which is what will happen. Tipped employees who are currently making $3.63 per hour would go to $4.95 per hour (60% of the proposed new $8.25 rate), subject to changes in the federal rate or cost of living after that. The purpose and subject of the Initiative Petitions is to increase the minimum wage. The phrase, "increase . . . to 60% of the state minimum wage," fairly and accurately describes how the increase will apply to tipped employees who are affected by the proposal. *See Coburn*, 2012 Mo. App. LEXIS 815 at *14-15 (summary statement is fair where it indicates the subject of proposed amendment with sufficient clarity to give notice of the purpose to those interested or affected by the proposal).

Plaintiff suggests that the summary statement should instead read, "increase the minimum *employer-paid* wage for tipped employees from 50% to 60% of the state minimum wage." He also relies on existing Department of Labor and Industrial Relations regulations that use the term "total compensation." See 8 CSR 30-4.020, cited at pages 32-33 of Plaintiff's Opening Brief. Plaintiff's language is worse, not better. The phrase "employer-paid wage" appears nowhere in the proposed amendment, current law or regulations. A summary statement that employed such unfamiliar or new language would

simply risk confusing voters. The current summary instead fairly communicates the real world impact of the proposed amendments and does so using the language of the current statute – that employees currently receiving the 50% minimum wage rate will get an increase to 60%. It is therefore fair and appropriate.

II. THE TRIAL COURT CORRECTLY GRANTED JUDGMENT FOR THE AUDITOR ON COUNTS II AND III OF PLAINTIFF'S PETITION BECAUSE THE FISCAL NOTES AND FISCAL NOTE SUMMARIES ARE FAIR AND SUFFICIENT, IN THAT THE AUDITOR REVIEWED SUBMISSIONS FROM GOVERNMENT ENTITIES AND MISSOURI JOBS WITH JUSTICE FOR REASONABLENESS AND COMPLETENESS, COMPILED THE SUBMISSIONS IN THE FISCAL NOTE WHICH GIVE AN ADEQUATE PICTURE OF THE FISCAL CONSEQUENCES OF THE MEASURE, AND SUMMARIZED KEY FINDINGS HAVING EVIDENTIARY SUPPORT IN THE FISCAL NOTE SUMMARY, AND PLAINTIFF FAILED TO SUBMIT HIS OWN INFORMATION.

(Responding to Cross-Appellant Allred's Point II.)

A. Standard of Review

In a court-tried case, as this one, "the trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *White v. Director of Revenue*, 321 S.W.3d 298, 307-308 (Mo. banc 2010). "In reviewing a particular issue that is contested, the nature of the appellate court's review is directed by whether the matter contested is a question of fact or law. When the facts relevant to an issue are contested, the reviewing court defers to the trial court's assessment of the evidence." *Id.* at 308 (citations omitted). When the evidence is uncontested, "no deference is given to the trial court's findings. *Id.*

In this case, there are some factual findings by the judge in his ruling that are

entitled to deference. He found that the Auditor's Office solicited information from state and local government entities, reviewed their submissions and that of Missouri Jobs with Justice for reasonableness and completeness, and incorporated the submissions into the fiscal note. (L.F. at 326, 334-36.) He held that the submissions contain "supporting material" for the State Auditor's statements in the fiscal note summaries. (L.F. at 334.) He also held that "the timeline granted to the Auditor to create a fiscal note and fiscal note summary effectively prevents" the Auditor from doing independent research. (L.F. at 336.)

B. Plaintiff Bears a Heavy Burden to Show that the Fiscal Note and Fiscal Note Summary Are Insufficient and Unfair, not Simply that the Auditor Could Have Done a Better Job.

Persons challenging the Auditor's fiscal note and summary for an initiative petition bear a heavy burden to demonstrate "in the first instance that the Auditor's fiscal note and fiscal note summary are insufficient and unfair" within the meaning of § 116.190, RSMo. *MML I*, 303 S.W.3d at 582. The plaintiff must prove with sufficient evidence what the fiscal note and/or official ballot title should have stated. *Overfelt*, 81 S.W.3d at 737.

The Court should give great deference to the Auditor to avoid the risk of becoming embroiled in the politics that are a natural aspect of initiative petitions. "'When courts are called upon to intervene in the initiative process, they must act with restraint, trepidation and a healthy suspicion of the partisan who would use the judiciary to prevent the initiative process from taking its course.'" *Missourians Against Human Cloning,* 190 S.W.3d at 456.

The words "insufficient" and "unfair" as used in Section 116.190 and applied to the fiscal note "mean to inadequately and with bias, prejudice, deception and/or favoritism state the fiscal consequences of the proposed proposition." *Hancock v. Secretary of State*, 885 S.W.2d 42, 49 (Mo. App. W.D. 1994); *MML I*, 303 S.W.3d at 581. The courts have held in ballot title cases that whether the state's work is "the best" work is not the test. *Missourians Against Human Cloning*, 190 S.W.3d at 457 (quoting *Bergman,* 998 S.W.2d at 92). Just because a fiscal note challenger shows that the Auditor could have done a better job and produced a different number does not mean that the fiscal note is insufficient and unfair. The law requires only that the note is adequate and without bias. *Hancock*, 885 S.W.2d at 49. It does not require "the most exhaustive of efforts" even if possible. *Overfelt*, 81 S.W.3d at 737.

The words "insufficient" and "unfair" as applied to a fiscal note summary "mean to inadequately and with bias, prejudice, or favoritism synopsize in [fifty words] or less . . . the fiscal note." *Hancock*, 885 S.W.2d at 49. Missouri courts are clear that "[a]ll of the details of a fiscal note need not be set out in a summary consisting of a mere fifty words." *MML I*, 303 S.W.3d at 583. "Further, a fiscal note summary is not judged on whether it is the 'best' language, only whether it is fair." *Id.*

C. The Auditor Prepared a Sufficient and Fair Fiscal Note and Fiscal Note Summary that Adequately State the Fiscal Consequences of the Proposed Measure, Both in terms of Direct Costs to Government and Potential Loss of Revenue.

Section 116.175.3 sets the requirements for a fiscal note and fiscal note summary. It

provides, very briefly, that the fiscal note and fiscal note summary "shall state the measure's estimated costs or savings, if any, to state or local governmental entities." § 116.175.3. The statute also provides that the fiscal note summary should summarize the note "in language neither argumentative nor likely to create prejudice for or against a proposed measure." *Id*.

There is no question that the fiscal note here encompasses the measure's possible costs and savings to state and local entities and thereby meets statutory requirements. The Auditor's Office included in the fiscal note every response it received from governmental entities indicating increased personnel costs. These responses totaled approximately $1.3 million. The Auditor's Office also included in the fiscal note statements from OA, the City of St. Louis, and a proponent noting the potential for increased wages and consumption that can lead to increased income and sales tax revenue, which affects net costs. OA and the City of St. Louis did not quantify the increase. The proponent did by updating OA's calculations from the 2006 fiscal note. It estimated that revenues could increase by $14.4 million. Likewise, the Auditor included in the fiscal note statements from OA, the City of St. Louis, and a proponent noting the potential for job loss and decreased business investment which can lead to decreased income and sales tax, which also affects net costs. No governmental entity quantified any decrease in revenue. OA noted the potential for decreased revenue, and the City of St. Louis indicated that gains could be offset by losses; but, neither provided a number.

The compilation of responses in the fiscal note adequately states the fiscal consequence of the measure to state and local entities. The responses from state agencies

give a nearly complete picture of the effect of the measure to them. The responses came from most major state agencies. (Tr. 113-114.) Of the twenty five inquiries sent to local entities and political subdivisions, such as the County of Jasper, the City of Columbia, the City of Kansas City, and the University of Missouri-Columbia, only five reported an increase in costs. It was rational for the Auditor to rely on these responses. The statute does not require the Auditor to contact every local entity and political subdivision in the state. It gives him the discretion to contact governmental entities. In addition, nothing in the statute requires the Auditor to assume a cost from an entity that is sent a request and does not respond. In fact, in these tight economic times, one would expect governmental entities to report substantial increased costs if a measure had such an effect.

The law does not require a fiscal note to be perfect and to include every possible effect for every governmental entity. The note need only be adequate. Compiling responses from a cross-section of governmental entities showing the possible consequences of a measure gives a picture of how the measure may affect state and local entities. This is adequate. While the fiscal note here does not include a response, or estimate a response, from each and every entity in the state about direct costs or revenues, it does not have to. Just as a summary statement does not have to include every detail about a measure to be sufficient and fair, a fiscal note does not need to detail actual amounts of estimated costs from every possible governmental entity, and in every possible way, to be adequate. *MML II*, 2011 Mo. App. LEXIS 1142 at *21 ("However, plaintiffs have cited no authority that to be meaningful a fiscal note must be detailed as to actual amounts of estimated costs.") A voter looking at this fiscal note can see that cities and counties may

have increased personnel costs. Even if the voter does not live in the City of Columbia, which reported increased costs in this instance, or the County of Jasper, which reported no employees making less than $8.25 per hour and no increased costs, the voter can easily deduce from the fiscal note that other cities and counties may experience increases and that others may not. Likewise, responses from OA and St. Louis about potential job loss give the voter an idea that the measure could lead to decreases in tax revenue in certain circumstances. It is perfectly adequate, and within what we expect of voters, to give them detailed information from multiple sources from which they can draw their own conclusions about a measure.

The fiscal note summary is also fair and sufficient. The Auditor drafted the summary using information provided by governmental entities and from a proponent. The Auditor's Office recognized that other governmental entities that had not responded to its inquiries could experience increased personnel costs too. The Auditor's Office did not have this specific information to put in the fiscal note, and did not want to speculate as to an amount without knowing the number of minimum wage employees each entity employed, so the Auditor accounted for the possibility in the fiscal note summary by stating that costs will "exceed" $1 million. Only 5 of 25 local entities reported any increased costs. In this context, the word "exceed" is reasonable. A voter will understand that the measure will cost state and local entities more than $1 million but that it is not known specifically how much more. *See MML II*, 2011 Mo. App. LEXIS 1142 at *21 (fiscal note summary describing costs as "significant" based on responses from local entities reporting that proposed measure would cost over $60 million is fair and not biased "in light of fact that

only a handful of cities reported potential substantial costs.").

The second sentence in the fiscal note summary states: "State government income and sales tax revenue could increase by an estimated $14.4 million annually; however, business employment decisions will impact any change in revenue." There is nothing unfair or wrong with the Auditor using the proponent's estimate of $14.4 million, which cited numerous sources and included a chart and spreadsheet. The provision in the statute allowing proponents and opponents to submit proposed statements of fiscal impact would be meaningless if the Auditor could not use these statements. The fiscal note summary also carefully qualifies the proponent's information. The Auditor uses the word "could" in explaining that tax revenues could increase, in contrast to the word "will" for increased personnel costs. He also calls the revenues "estimated" and "potential." These words explain to voters that the increase may happen, up to $14.4 million, but allows that it may not happen or that it may be less. This does not mislead voters into thinking revenues will absolutely increase, but fairly explains a range of what could happen. In *Hancock v. Secretary of State*, 885 S.W.2d 40 (Mo. 1994), the Court upheld a fiscal note summary that stated a range of costs from $1 billion to $5 billion where there was uncertainty as to the amount. If a $4 billion range is fair, then language that indicates potential additional costs and increases and decreases in revenue in the millions is fair.

In addition to qualifying the proponent's information in the second sentence of the fiscal note summary, the Auditor uses the word "however" to signal to voters that increases may be offset by decreases. OA and the City of St. Louis noted the potential for lost jobs and lower business investment, which could affect revenue increases. The Auditor

accepted this possibility, and accounts for it in the summary. Plaintiff quibbles with the Auditor's word selection, but there is nothing argumentative about it. The structure of the sentence as whole, with the word "however" between the two phrases, naturally suggests a yin and yang, increases offset by decreases, and does not logically suggest increases followed by more increases. The terms "business employment decisions" and "impact" are broad and include possible jobs losses and reductions in hours. The terms are accurate, not prejudicial. Business decisions to cut jobs or reduce hours would impact revenues by causing them to decrease. That Plaintiff would prefer other more specific language does not make the fiscal note summary unfair. The Auditor is allowed leeway in drafting a summary, and does not have to use the best language. *MML I*, 303 S.W.3d at 583 ("a fiscal note summary is not judged on whether it is the 'best' language, only whether it is fair."). Likewise, that the fiscal note summary does not specifically refer to business investment decisions does not make it unfair. No entity quantified this amount, and Intervenor's expert explained how most Missouri businesses do not pay corporate income tax. (Tr. at 237.) The fiscal note summary is not required to specify this unknown, minor detail. *MML I*, 303 S.W.3d at 583 ("[a]ll of the details of a fiscal note need not be set out in a summary consisting of a mere fifty words.").

D. Plaintiff's Argument Regarding the Auditor's Process Disregards the Controlling Statute and Fails to See How the Auditor May Account for Unquantified Information in the Fiscal Note Summary.

Plaintiff dedicates much of his challenge on the fairness and sufficiency of the fiscal note to attacking the process that the Auditor followed. (Pl.'s Opening Brf. at 51-64.) The

crux of the matter for Plaintiff is that the fiscal note lists only $1.3 million in direct costs to state and local entities from the proposed measure, using responses from those entities. He claims the number is much higher; and, if the Auditor had followed a different process, then the fiscal note would have included a much higher number. Plaintiff also argues that the fiscal note summary is unfair because it does not specifically state what factors will reduce potential increased revenue in what amounts.

Plaintiff's argument fails. First, it foists on the Auditor a process for drafting a fiscal note that the statute does not require. The current process produced an adequate note. In fact, Plaintiff's proposed process would require the Auditor to delve into policy debates, which is exactly what he should not do. Second, Plaintiff glosses over the differences between a fiscal note and fiscal note summary. The fiscal note is not meant to be a perfect economic analysis of a measure. The fiscal note summary, which is what a voter sees on the ballot, can account for information not specifically given to the Auditor, and thereby adequately explain the fiscal consequences of the measure.

1. The Auditor's process for drafting a fiscal note follows Section 116.175 and results in information that adequately explains the fiscal consequences of proposed measures.

In order to assess the fiscal impact of a measure, Section 116.175.1 states that the Auditor "may consult with the state departments, local governmental entities, the general assembly and others with knowledge pertinent to the cost of the proposal" and may accept "proposed statements of fiscal impact" from proponents and opponents. That is exactly what the Auditor did here. He sent requests to 50 different state and local entities and

political subdivisions, representing a cross-section of large and small, urban and rural, entities from across the state. He received 28 responses, and included them all in the note. He also received a proposed statement of fiscal impact from a proponent. He did not disregard any response, and included information from the proponent in the note.

The Missouri Court of Appeals has upheld the Auditor's process for drafting fiscal notes. In *Missouri Municipal League v. Carnahan (MML I)*, 303 S.W.3d 573 (Mo. App. W.D. 2010), the plaintiff claimed that the Auditor had failed to independently assess the fiscal impact of proposed measures by following his standard process of soliciting comments, reviewing them for reasonableness and completeness, and transcribing them into the note. The Court rejected this argument. It found that the plain language of Section 116.175 does not mandate that the Auditor adopt another method of independently assessing the costs or savings of a measure, and held the current process to be adequate. *Id.* at 582.

Here, Plaintiff is arguing, like the plaintiff in *MML I*, that the Auditor must undertake an independent investigation. This is not required by statute or necessary to inform voters of the fiscal consequences of a proposed measure. The statute contemplates the Auditor contacting state and local entities. Section 116.175 states he "may" consult with them. The statute sets no other requirements for what process the Auditor must follow. The fact that the statute provides that the Auditor may contact state and local entities, but does not require him to contact every entity in the state, and the fact that the statute gives him no other instructions on how he must assess the fiscal impact of a measure, strongly suggests that it is sufficient for the Auditor to draft the note based on

responses received. This information, from a cross-section of governmental entities, gives voters a fair assessment of how a measure will affect state and local entities, including their own. It provides a picture how different types of entities will be affected.

Plaintiff's demand for an independent investigation would lead to greater problems. First, as a practical matter, the Auditor does not have time to conduct an independent investigation. The Auditor has only 20 days to draft a note and fiscal note summary. During much of that time, he is sending inquiries to and waiting for responses from state and local entities. At the same time, he is also drafting fiscal notes for other petitions. This past year alone, the Auditor drafted notes and summaries for some 60 to 70 petitions. It took Plaintiff's expert 12 to 15 hours to draft his report. The Auditor does not have a PhD economist on staff, and it would surely take his office more time, which it does not have, to even begin to do what Plaintiff's expert did.

Second, there is no definition of an independent investigation. How deeply must the Auditor investigate issues implicated by a proposed measure? Plaintiff argues that the Auditor must extrapolate from responses he receives to calculate direct costs, (Pl.'s Opening Brf. at 52), even though Mr. Halwes testified that he did not know how many minimum wage employees each governmental entity employs, and was not provided that information by opponents or governmental entities, (Tr. 68). Plaintiff also suggests that the Auditor must follow-up with every entity that does not respond to a request and entities like St. Louis City that offer information on revenues but not specifically on costs. (Pl.'s

Brf. at 54-56.)[8] Plaintiff also faults the Auditor for readily accepting proposed statements of fiscal impact without independently evaluating the assumptions underlying the calculations. For Plaintiff, the Auditor must second-guess each submission, research the issue and sources himself, and reach his own policy conclusions.

Plaintiff's view of an independent investigation is impossible if not dangerous. Plaintiff neglects to mention that the Auditor has no power to compel any entity to respond to an inquiry. What would the Auditor do if an entity refuses to cooperate? In addition, under Plaintiff's theory, the Auditor cannot rely on responses it receives. Plaintiff does not trust statements from local entities that he speculates are incomplete, like that from the City of St. Louis. The Auditor would have to tell each entity how to determine whether a measure will affect their costs and revenues and then second-guess those responses.

Plaintiff's real argument is that the Auditor should research a proposed measure like his expert did and reach the same sort of conclusions. Plaintiff's expert used his background in labor economics and familiarity with census data to calculate the number of state and local employees that would receive a raise under the proposal, by using individual

[8] Plaintiff's claim about the City of St. Louis's response is strained. He argues that the City "inexplicably left off a direct cost number." (Pl.'s Opening Brf at 10.) However, there is no evidence that the measure will have a direct cost, in the form of increased personnel costs, to the City of St. Louis. Plaintiff did not provide such information for St Louis specifically.

responses from a small sample of workers and extending them across the state.[9] He did not contact state or local governmental entities; in fact, he would assume they would suffer increased costs even if they did not report any. (Tr. at 173.) Plaintiff's expert also estimated potential job loss from the measure, based on academic research finding negative employment elasticities associated with increases in the minimum wage. He discounted research to the contrary.

The standard in a ballot title case cannot be what a PhD labor economist with 25 years experience does to calculate the fiscal consequences of a measure after reviewing the matter for some 12 to 15 hours. Plaintiff's expert's methodology may be more sophisticated than the Auditor's, but that does not mean that the Auditor should have used the same methodology as the Plaintiff's expert. Such an expectation would be impossible to satisfy.

Plaintiff contends that the information that his expert used is publicly available. That may be true, but that does not mean that the Auditor has the expertise and knowledge to access that data, to manipulate it, to extend it across the state, or to calculate a confidence interval. Plaintiff's expert has been using such data sets for years. The Auditor is not an expert for all issues in all proposed measures. That is one reason the statute allows opponents to submit a proposed statement – to provide information the Auditor lacks the expertise to obtain.

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[9] Plaintiff's expert did not know how many of those employees were state versus local employees. (Tr. at 170.)

Plaintiff also argues that, after seeing proponent's estimate for revenue increases, the Auditor should have known that the measure's direct cost to governmental entities could be much higher. But, it would have been risky for the Auditor to have written a higher number into the fiscal note summary at that time or to have stated the number was much higher. Only 5 of 25 contacted local entities reported increased costs, and the Auditor did not have information from other local entities on direct costs. In this context, the use of the phrase "exceeds $1 million" is reasonable. It allows for a higher number. The Auditor should not be faulted for making a good faith effort using the information available to him at the time from the very entities that the statute says he may contact to assess the fiscal impact of a measure.

Plaintiff's suggestion that the Auditor must engage in independent research to reach the type of conclusions that his expert did in this case is also dangerous – it would inject the Auditor into policy debates surrounding initiative petitions that he (and the Court) should avoid. In this regard, Plaintiff's expert's opinion on job loss is not universally accepted. The record shows, and Intervenor's expert explained, a legitimate debate in the academic community regarding the effects of an increase in the minimum wage on employment. (Tr. at 167, 178-79, 233-236.) Certain economists find job loss. Other economists do not. Both camps include academics at well respected universities with articles published in peer-reviewed journals. Both camps, including Plaintiff's expert, also have their own policy views about increases in the minimum wage. Plaintiff's expert opposes such increases. (Tr. at 162-63.)

The Court should not set a standard that would have the Auditor, through an

independent investigation, accept or reject contested positions in policy debates and by extension pick sides on a ballot measure. It is not the state's role to engage in the merits of a measure. That is for voters. *See State ex rel. Humane Society of Missouri v. Beetem*, 317 S.W.3d 669, 673-74 (Mo. App. W.D. 2010) ("[The] court's role 'is not to act as a political arbiter between opposing viewpoints in the initiative process.'"). The better standard in ballot title cases, as set forth in Section 116.175, is to allow the Auditor to contact governmental entities, rely on their responses (or non-responses), include them in the note, to refrain from over-speculation, to account for the possibility of additional amounts in the fiscal note summary, and to refrain from policy debates.

Finally, Plaintiff analogizes to and the "arbitrary and capricious" standard. That is not the test in this case. But, if this were the standard, the Auditor's process easily meets it. A case that Plaintiff relies on – *Missouri National Education Association v. Missouri State Board of Education*, 34 S.W.3d 266 (Mo. App. W.D. 2000) – shows this. The statute there gave the State Board of Education the discretion to grant waivers from certain salary requirements to school districts. In determining whether to grant a request for a waiver, the Department of Elementary and Secondary Education (DESE) "reviewed each request to determine whether the district provided reasons for its request and if the mathematical calculation was accurate." *Id*. at 281. DESE then gave a summary of the request and comments received by school district employees to the State Board to act on. *Id*. The Court of Appeals found this process to be "fair consideration" of the requests, *id*. at 283, and held the Board's reasons for granting the waivers, based on the reasons given by the districts, to be reasonable and neither "whimsical or impulsive." *Id*.

If the process in the *MNEA* case was "fair consideration" of a matter and not "guess work," then the process the Auditor follows in drafting a fiscal note is certainly fair and is not "guess work." Like DESE, the Auditor reviews responses to see if they are responsive – i.e., determines that they are reasonable and complete. (Tr. 48, 82-84, 92.) Like DESE, the Auditor checks the math – i.e., replicating proponent's calculations. (Tr. 45-48.) And, like DESE, the Auditor summarizes comments – i.e., transcribing responses. (Jt. Stip., ¶ 22, see Intvr's App. at A038-A039.) The fiscal note and fiscal note summary are then available to the people to make a decision. Based on the process in the *MNEA* case, the Court found the State Board's decisions to be reasonable. Based on the process here, the Court should find a reasonable basis for the people to make a decision. The Auditor properly exercised his discretion to send inquiries to and collect responses from entities, reviewed them for reasonableness and completeness and used that information to draft a fiscal note summary accounting for fiscal consequences.[10]

2. The fiscal note summary properly accounts for increased costs and decreased revenues that were not quantified in the fiscal note.

Plaintiff seems to fault the Auditor's Office for accounting for additional costs in

[10] *Barry Serv. Agency Co. v. Manning*, 891 S.W.2d 882 (Mo. App. W.D. 1995) is distinguishable. The agency there did not formally collect any information. Here the Auditor sent requests to 50 entities and reviewed responses for reasonableness and completeness. The Auditor was neither whimsical nor impulsive.

the fiscal note summary, such as additional direct costs to governmental entities and decreases in revenue. This is not a fault, but a proper use of the fiscal note summary.

Section 116.175.3 states that both the fiscal note and the fiscal note summary shall state the measure's estimated costs or savings, if any, to state or local governmental entities. They both have the same purpose. It is important to remember, though, that the fiscal note is not attached to petitions when circulated or to ballots when voted. The petition includes the fiscal note summary and the text of the measure, but not the fiscal note. § 116.050 & .180, RSMo. The ballot includes the official ballot title, which consists of the summary statement and the fiscal note summary. § 116.230, RSMo. This means that most voters are likely to see only the fiscal note summary. In this regard, it is a stretch to say that a fiscal note is deceptive. Few, if any, voters ever see the fiscal note.

Given that the fiscal note and fiscal note summary have the same purpose, and that most voters will see only the fiscal note summary, it is perfectly legitimate for the Auditor to account for costs in the fiscal note summary using more general language. As noted above, the fiscal note is adequate in reporting direct costs from responses the Auditor received and in noting the potential for job loss and decreases in revenue. The responses give a fair picture of how the measure will affect state and local entities, from a cross-section of entities. It gives the Auditor a means to asses and voters a means to understand the fiscal consequences of the measure. The fiscal note summary is also fair and sufficient because it adequately synopsizes the note. The Auditor conservatively estimated that other governmental entities that did not report a cost increase could experience an increase, so stated that costs will exceed $1 million. He also conservatively

estimated that increases in revenues would be offset by job losses, so stated that business employment decisions will impact revenue. These statements are accurate, and to the benefit of voters because they synopsize what the Auditor believes will happen.

Plaintiff complains about the words "exceed" and "business employment decisions" and "impact." Not only is such detail not required as explained in Section II.C above, but this general language conveys more information to voters. It rounds out the fiscal impact of the proposed measure. The fiscal note presents a picture of the measure as it affects specific entities. The fiscal note summary gives a more general view.

E. Plaintiff Cannot Rely on Post-submission Evidence to Attack the Fiscal Note Where He Knew of the Initiative Petition but Failed to Submit Information About It as Permitted under Section 116.175.

Counts II and III of Plaintiff's First Amended Petition fail for an additional reason. Plaintiff relies on his expert's information, including the estimate of the measure's purported direct costs to state and local entities, to attack the fiscal note. However, Plaintiff failed to provide this information to the Auditor while the note was being drafted, even though he had the opportunity under Section 116.175. The Court should not permit Plaintiff to rely on information that he could have submitted, but failed to.

The evidence is undisputed that Plaintiff knew about the initiative petition by October 6, 2011. (Tr. at 183-184.) He had 19 days to then submit information to the Auditor, until October 25, 2011. His expert testified that he could have submitted his report in that time. (Tr. at 169.) The Auditor would have considered any information that the Plaintiff submitted, including direct costs to state and local entities. (Tr. at 106.)

Nonetheless, Plaintiff failed to submit a proposed statement. Instead, he waited and sued. He did not disclose his information, via his expert's report, until April, 2012 -- some five and one-half months after the deadline for the Auditor to draft the fiscal note.

A fair reading of Section 116.175 indicates that a fiscal note challenger should not be allowed to use information that he could have submitted to the Auditor within the 20 day time period to later challenge a note. Section 116.175 states that a proponent or opponent may submit a proposed statement within 10 days of the Auditor's receipt of the initiative petition. § 116.175.1, RSMo. It further states that the Auditor may consider information from "others with knowledge pertinent to the cost of the proposal" through the 20th day, when the Auditor must forward the fiscal note and fiscal note summary to the attorney general. § 116.175.1 & .3, RSMo.[11] Under the language of the statute, the Auditor cannot consider more information after 20 days, and there is no provision for the Auditor to

[11] Plaintiff refers to Intervenor's proposed statement as "late." Plaintiff does not argue in any point relied on that the Auditor should not have considered Intervenor's submission, and has therefore waived any such argument. *See Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. banc 2002) (argument not set out in point relied on and merely referred in argument portion of brief is deemed abandoned). In any event, the Auditor acted properly in considering Intervenor's proposed statement. Even though submitted after 10 days, it was received before the 20 day deadline, and the Auditor had the discretion to consider the information at that time under the statute because proponent has "knowledge pertinent to the cost of the proposal."

continue to add information to the note after he forwards it to the attorney general. He therefore has no obligation to consider Plaintiff's belated information.

Section 116.175 represents a compromise between the need to quickly draft a fiscal note and the need to provide information to petition signers and voters. A challenger should not be allowed to circumvent this process by sitting on information. Section 116.190, setting forth the cause of action for challenging a fiscal note, supports this view. The statute expressly describes the trial process. It states: "Insofar as the action challenges the fiscal note or fiscal note summary portion of the official ballot title, the court shall consider the petition, hear arguments, and in its decision, either certify the fiscal note or the fiscal note summary of the portion of the ballot title to the secretary of state or remand the fiscal note or fiscal note summary to the auditor pursuant to the procedures set forth in section 116.175." § 116.190.4, RSMo. Notably, the statute makes no mention of hearing evidence on information which an opponent claims the Auditor should have known. The opponent already had the opportunity to submit such evidence to the Auditor via a proposed statement of fiscal impact. The presumption is that the opponent submitted this information in time; and, if the opponent failed to submit it, then the opponent is not allowed to use it to challenge the note.

Allowing Plaintiff to use unsubmitted information to carry his burden of proof as to what a fiscal note should have said incentivizes the withholding of information and lawsuits. Rather than submit a proposed statement of fiscal impact as Section 116.175 allows, an opponent can sit on his information, wait until the Auditor drafts the fiscal note, and then file suit. This is contrary to what should happen. Policy supports both proponents

and opponents submitting information to the Auditor during the 20 day period so he can include it in the note. Doing what Plaintiff has done, when he knew of the initiative petition, and when his expert could have submitted information, unfairly burdens the prompt processing of petitions and circumvents the Auditor in ways that frustrate the process.

F. Assuming *Arguendo* that the Fiscal Note and Fiscal Note Summary are Not Sufficient and Fair, the Appropriate Remedy is Prospective Only, and the People Can Still Vote on the Measure.

For the reasons stated above, this Court should affirm the trial court's judgment finding the summary statement, fiscal note, and fiscal note summary to be fair and sufficient. However, should it reverse, the Court should make clear that the remedy is prospective only, and not retrospective.

Opponents to ballot measures regularly bring suit challenging official ballots title as insufficient and unfair in the hope that it will invalidate signatures gathered to date. The theory is that the Secretary of State cannot count signatures collected under a "bad" ballot title. The opponent may raise this claim after a proponent submits petition sheets with signatures by way of an action challenging the sufficiency of the signatures.

The relevant statutes and the Missouri Constitution both indicate that signatures are valid even if collected under a "bad" ballot title. The appropriate remedy is to re-write the official ballot title for the ballot so that the people may still vote on the matter, not to invalidate signatures.

Section 116.190.4 provides for a limited remedy in ballot title cases. With regard to

the summary statement, the Court may certify the summary statement portion of the official ballot title to the secretary of state. With regard to the fiscal note and fiscal note summary, the Court may remand to the Auditor for preparation of a new note and summary. The fact that Section 116.190 makes no mention of invalidating signatures shows that re-writing the ballot title does not invalidate signatures. The proponent can circulate a petition with new language to collect more signatures. If the proponent has already submitted signatures, and the constitutional deadline to submit signatures has passed, then the Secretary of State can put new language on the ballot. *See Missourians Against Human Cloning*, 190 S.W.3d at 463 (Smart, J., concurring in part and dissenting in part) (opining that problems with the ballot title can be addressed at the voting stage).

This view is buttressed by Section 116.195, the next provision following Section 116.190. Section 116.195 states that "whenever the re-printing of a statewide ballot measure is necessary as a result of a court-ordered change to the ballot language for such a measure, the costs of re-printing shall be paid by the state." § 116.195, RSMo. If signatures were no longer good after a court-ordered change to ballot language, then there would be no need to re-print the ballot. If the signatures were not good, the matter could not go to a vote. It is because the signatures are still good that the measure goes to a vote.

Making the remedy in these cases prospective only avoids infringing the constitutional right of the people to enact and propose law by initiative petition. Article III, Sections 49 and 50 of the Missouri Constitution give the power to the people to bypass the General Assembly and to enact laws on their own. While statutes are needed to implement this right, Missouri courts have long held that these statutes cannot infringe on this right.

See, e.g., United Labor Committee v. Kirkpatrick, 572 S.W.2d 449, 454-455 (Mo. banc 1978) (legislation cannot limit or restrict rights conferred by a constitutional provision). Were the Court to allow a re-written ballot title to invalidate signatures, it would unfairly impede the constitutional rights of the people. It would mean that a mistake by the Secretary of State or Auditor could prevent the people from voting on a measure. This is unfair to a proponent. It would also elevate the statutory right of opponents to challenge the fairness and sufficiency of a measure over the constitutional right of the people to enact laws. Article III, Sections 49 and 50 make no mention of summary statements, fiscal notes, or fiscal note summaries as requirements for an initiative petition. These are creatures of statute. Accordingly, they can supplement rights under the Constitution, but cannot be used to defeat them. The Court must avoid any remedy from these statutes that would violate a constitutional right. *See Rekert v. Kirkpatrick*, 639 S.W.2d 606 (Mo. 1982) (provisions under which the people exercise the power of initiative must be liberally construed so as not to interfere with the initiative process); *United Labor Committee*, 572 S.W.2d at 454 & 455 (procedures designed to effectuate the right of initiative petition "should be liberally construed to avail voters of every opportunity to exercise those rights"; the "initiative process is too akin to our basic democratic ideals to have this process made unduly burdensome.") The only way to do that in a ballot title case is to order a prospective remedy only and clarify that signatures gathered to date are still valid and may be used to put a measure to vote.

CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's judgment finding the summary statement, fiscal note, and fiscal note summary for Version 1 to be sufficient and fair and certifying the same.

Respectfully submitted,

SCHUCHAT, COOK & WERNER

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that:

(1) this brief contains the information required by Rule 55.03;

(2) this brief complies with the limitations contained in Rule 84.06(b);

(3) there are 14,441 words in this brief.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 19th day of June, 2012, a true and correct copy of the Response Brief of Intervenor/Respondent/Cross-Appellant Missouri Jobs with Justice was served by electronic mail on each of the following individuals:

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